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BY ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Written Ex Parte*
UNE Triennial Review – CC Docket No. 01-338
Local Competition – CC Docket No. 96-98
Deployment of Advanced Wireline Services – CC Docket No. 98-147

Dear Ms. Dortch:

Attached for inclusion in the record of the above-referenced proceedings is a legal memorandum, entitled "Legal and Policy Considerations with respect to EELs," filed on behalf of WorldCom, Inc., pursuant to 47 C.F.R. § 1.1206(b).

Sincerely,

/s/ Ruth Milkman
Ruth Milkman

Attachment

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WORLDCOM

LEGAL AND POLICY CONSIDERATIONS WITH RESPECT TO EELS

In the *UNE Triennial Review* proceeding, the Commission is considering whether permitting competitive carriers unrestricted use of loop-transport combinations (also called enhanced extended links or "EELs") would advance the goals of the Communications Act. In WorldCom's view, the unrestricted use of the combination of high-capacity loops and transport is essential to the future of competition for larger business customers.[1] The recent court decision, *CompTel v. FCC*,[2] which concluded that the Commission did not overstep its authority in imposing interim restrictions on EELs, does not impede the Commission's ability to conclude, on the basis of the record before it today, that removing those interim use restrictions best serves the policy goals of the Communications Act. In this letter, WorldCom first explains why the *CompTel* decision has little bearing on the question before the Commission today. WorldCom then shows that the concerns that led to the temporary restrictions no longer can justify such restrictions. WorldCom next reviews the policy considerations that militate in favor of lifting the restrictions, and responds to arguments made by the Bell Operating Companies ("BOCs") with respect to the likely effect on BOC revenues of removing restrictions on EELs, and the relevance of competition in downstream businesses that depend on special access. Finally, WorldCom shows that lifting the prohibition on "commingling" will enhance the efficiency of network deployment.

I. Permitting Unrestricted Use of EELs Is Entirely Consistent with the *CompTel* Decision

In light of key developments that have occurred since the Commission imposed interim use restrictions on EELs in its *Supplemental Order* and *Supplemental Order*

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[1] While this letter focuses on high-capacity EELs because those are the loop/transport combinations that have been the primary focus of the commenting parties in this proceeding, it is WorldCom's view that there should be no restrictions (whether restrictions on use or prohibitions on commingling) with respect to any EELs, including DS0 EELs. WorldCom has addressed the pricing and availability of DS0 EELs in a separate *ex parte*. *See* Letter from Kimberly Scardino, WorldCom, to Michelle Carey, FCC (Nov. 13, 2002) ("Scardino Letter"). (Except as otherwise noted, all comments, reply comments and ex parte filings cited herein are found in CC Docket No. 01-338.)

[2] *Competitive Telecommunications Ass'n v. FCC*, No. 00-1272, -- F.3d --, 2002 U.S. App. LEXIS 22407 (D.C. Cir. Oct. 25, 2002) ("*CompTel*").

Clarification,[3] including the development of an extensive record and the issuance of orders that address the universal service concerns that were the impetus for the temporary restrictions, the Commission should allow competitors to use EELs for all services on an unrestricted basis, provided competitors would be impaired without access to both the loop and the transport elements that comprise such EELs.

A Commission decision to permit unrestricted use of EELs is entirely consistent with the court of appeals' recent decision in *CompTel*. The key issue in *CompTel* was whether the Commission had justified its application of temporary service-specific use restrictions on unbundled network elements ("UNEs").[4] The court concluded that the Commission has broad discretion to conduct its impairment analysis on a granular basis, including on a service-by-service basis, if justified by the record evidence.[5] The court then concluded that the Commission's stated reasons for adopting its interim limitations were adequately supported. Specifically, the court concluded that the Commission's temporary restrictions were justified because the Commission needed the opportunity to consider whether a broader unbundling rule might harm its universal service program or injure the ability of competitive access providers ("CAPs") to invest in their own facilities.[6] Notably, neither the court nor the Commission found that the restrictions were in fact necessary to protect these interests. Rather, as the court noted, the Commission merely concluded that it needed more time and a more developed record to consider these questions.[7]

The court's holding that the Commission was entitled to maintain the *status quo* until it developed a record that enabled it to answer relevant questions has no bearing on the Commission's analysis in this proceeding. The Commission now has before it the record it was missing at the time of the *Supplemental Order* and *Supplemental Order Clarification*,[8] and nothing in the Commission's previous interim orders, or in the court's decision affirming those orders, speaks to how the Commission should evaluate that evidence.

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[3] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order, 15 FCC Rcd 1760 (1999) ("*Supplemental Order*"); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, 15 FCC Rcd 9587 (2000) ("*Supplemental Order Clarification*").

[4] In its *Supplemental Order* and *Supplemental Order Clarification*, the Commission adopted a "temporary constraint" on the use of EELs that required carriers to use EELs to provide "a significant amount of local exchange service." *Supplemental Order* ¶ 2. The Commission also prohibited competitive local exchange carriers ("LECs") from "commingling" EELs with the incumbent LEC's tariffed access services. *Supplemental Order Clarification* ¶ 22.

[5] *CompTel* at *7-14.

[6] *Id.* at *5-8.

[7] *See id.* at *8 ("In this case, the FCC has only issued an interim rule while it further studies the issues to determine what rule will best promote facilities-based competition.")

[8] *See Supplemental* Order ¶¶ 4, 7; *Supplemental Order Clarification* ¶ 8.

The Commission has developed an extensive record in this proceeding that demonstrates that almost every telecommunications service offered by competitive LECs is critically dependent on incumbent LEC transmission facilities. WorldCom, for example, has shown that it provisions approximately 90% of its last-mile DS1s over incumbent LEC special access facilities,[9] and that WorldCom (and other competitors) use these facilities to provide a variety of services, including: local exchange service; ordinary voice long distance services; and data services such as ATM, frame relay, remote LAN, and Gigabit Ethernet.[10] WorldCom has also shown that there is not a single service that it offers its business customers that is not almost entirely dependent upon these incumbent LEC last-mile transmission facilities.[11] Despite attempts to suggest that competitive alternatives exist, the BOCs have failed to provide any hard facts contradicting the evidence that WorldCom and other competitive carriers remain dependent on incumbent LEC last-mile facilities.[12]

Given the overwhelming evidence of competitive carriers' continued dependence on incumbent LEC local transmission facilities, it would be pointless for the Commission to conduct service-specific impairment analyses for either loops or transport and, by extension, for loop/transport combinations (*i.e.*, EELs).[13] The only plausible justification for performing such analyses would be that the inquiries would likely yield different results for different services. Yet, as just explained, the ability of competitors to offer virtually every telecommunications service is dependent upon access to the local transmission facilities of incumbent LECs. This is hardly surprising: if a particular network element is generally available only from the incumbent LECs for one use, that network element will be generally available only from the incumbent LECs for other uses as well. Thus, for example, if requesting carriers are impaired in their provision of local exchange service without unbundled access to the incumbent LECs' local loop and transport facilities because there are few if any alternatives in the marketplace, then few alternatives exist for carriers seeking to use those same facilities to provide access or

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[9] *See* Letter from Henry G. Hultquist, WorldCom, to Marlene H. Dortch, FCC, at 2 (Oct. 29, 2002) and Erratum (Oct. 30, 2002) ("Hultquist Letter").

[10] *See, e.g.*, WorldCom Comments at 14 (Apr. 4, 2002); WorldCom Comments, CC Docket No. 01-337, at 22 (Mar. 1, 2002).

[11] WorldCom Comments at 14-23 (demonstrating that incumbent LEC exchange access facilities "are an essential input for all business services" provided by competitive carriers).

[12] *See, e.g.*, WorldCom Reply Comments at 122-25 (Jul. 17, 2002).

[13] As the Supreme Court's *Verizon* decision made clear, under the Commission's existing rules incumbents are legally obligated to combine the loop and transport elements that comprise an EEL, provided that competitors would be impaired under section 251(d)(2) without unbundled access to each of the network elements (*i.e.*, loop and transport) that comprise the EEL. *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 122 S.Ct. 1646, 1684-87 (2002) ("*Verizon*"); 47 C.F.R. § 51.315(c) & (d). Thus, competitors are entitled to cost-based EELs wherever they are impaired without access to the loop and transport UNEs.

other telecommunications services.[14] It follows, therefore, that wherever competitors are impaired without access to the loop and transport elements (and therefore are entitled to EELs) for one service, the Commission should treat competitors as being impaired without such access for all services. It simply would not make sense for the Commission to expend considerable time, effort, and resources conducting discrete service-specific analyses where these analyses would yield the same finding of impairment for every service.[15]

Instead of conducting a service-by-service impairment analysis, the Commission should, as WorldCom and others have argued,[16] conduct a more geographically granular analysis for certain UNEs, including transport.[17] If the Commission were to employ a more geographically granular analysis, the record suggests the Commission would find that in the great majority of locations, competitive LECs are impaired without access on an unbundled basis to loops and transport.[18] In all such locations, competitive LECs would also be entitled to the loop/transport combination (EEL) under *Verizon* and the Commission's rules.[19]

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[14] Likewise, there is no need for the Commission to perform a service-specific inquiry with respect to other UNEs. For all UNEs, it is reasonable for the Commission to presume that if impairment exists with respect to one potential use of a UNE, it exists with respect to all uses of that element. With the line information database ("LIDB"), for example, impairment exists because a competitive LEC cannot duplicate the information in the BOC's database. This is equally true regardless of whether the competitive LEC's customer is making a local or long distance call. Indeed, the Commission's prior impairment analysis for LIDB almost of necessity applied to long distance services, as that is by far the most prevalent use of LIDB. *See* WorldCom Comments at 58.

[15] *See* WorldCom Comments at 59-60.

[16] *See, e.g.*, WorldCom Reply Comments at 20-25, 125-129; AT&T Reply Comments at 268-275; SBC Comments at 88.

[17] As WorldCom explained in its reply comments, the Commission should adopt national unbundling rules for elements for which there is little geographic variation in the level of impairment. WorldCom Reply Comments at 23. *See also* Hultquist Letter at 4-5 (explaining that a granular analysis of transport impairment must focus on relevant competitive alternatives).

[18] *See* WorldCom Reply Comments at 63-131 (setting forth impairment analysis for loops and dedicated interoffice transport).

[19] *Verizon*, 122 S.Ct. at 1684-87; 47 C.F.R. § 51.315(c) & (d). As the Commission has previously held, the availability of incumbent services, such as special access, is not relevant to the impairment analysis. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶¶ 286-287 (1996) ("*Local Competition Order*"); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* Third Order on Reconsideration and Further Notice of Proposed Rulemaking, 12 FCC Rcd 12460, ¶ 37 (1997) (rejecting the suggestion that requesting carriers are not impaired in their ability to provide a service merely because they can obtain the service at wholesale rates from an incumbent LEC); *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 393-395 (1999), and *Iowa Utilities Board v. FCC*, 120 F.3d 753 at 810, 814-15 (8th Cir. 1997), *reversed*

II. The Concerns that Led to the Temporary Use Restrictions Can No Longer Justify Such Restrictions

The temporary use restrictions of the *Supplemental Order* were based on the Commission's desire to develop a record to consider two concerns about the use of EELs to provide access services: concerns about the universal service program, and concerns about the developing competitive market for access services. Now that a record on each of these points has been developed, it is clear that neither concern justifies the use restrictions.

Universal Service. As part of its original justification for imposing interim use restrictions on EELs, the Commission expressed a concern that the use of combinations of UNEs in lieu of special access "would threaten an important source of funding for universal service."[20] It is not clear that was ever the case, but in any event, no one can now plausibly argue that the unrestricted use of EELs poses any serious threat to universal service, and the record is devoid of any evidence that would support such a claim. First, special access rates do not include implicit subsidies for universal service,[21] and therefore the fact that EELs would replace special access does not in and of itself implicate universal service concerns. Second, there is no sound reason to believe that allowing the use of UNEs to provide special access services would undermine universal service by reducing interexchange carriers' use of switched access.[22] In any case, the Commission has stated that the implementation of the *CALLS Order* will lead to the removal of all universal service subsidies from the incumbent LECs' switched access charges.[23]

If universal service subsidies have not yet been completely eliminated from switched access, they have, at the very least, been greatly reduced, and the Commission has made clear that their phase-out is already well advanced and will continue to proceed down a steep glide path.[24] In the *CALLS Order*, for instance, the Commission

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in part on other grounds, AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999) (the fact that a capability may be available as a service does not necessarily preclude that capability from being available as a network element). *See also* WorldCom Reply Comments at 28.

[20] *See Supplemental Order Clarification* ¶ 7.

[21] *See Expanded Interconnection With Local Telephone Company Facilities*, 7 FCC Rcd 7369, 7381, ¶ 16 (1992) (recognizing that the rates for special access services had never contained implicit universal service subsidies), *vacated in part on other grounds and remanded, Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

[22] *See* WorldCom Reply Comments at 36.

[23] *See Access Charge Reform*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962, ¶¶ 32, 202 (2000) ("*CALLS Order*").

[24] *See Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 320 (5th Cir. 2001) (explaining that the *CALLS Order* phases in some aspects of reform, but established the $650 million universal service fund immediately). *See also CALLS Order* ¶ 110 (estimating that by July 2004, the five-year phase out of the multi-line business PICC

immediately removed the bulk of the universal service subsidy from interstate switched access service and replaced it with an explicit fund of $650 million.[25] In addition, as noted below, even if the Commission lifts its use restriction on EELs immediately, it will take years for carriers to complete the transition from special access to EELs. It is thus no longer plausible to argue there would be any serious risk to universal service if the use restrictions were eliminated.

Competitive Access Providers. The record before the Commission does not support a finding that EELs will undermine the ability of competitive access providers to invest in their own faciltities by lowering the ceiling on the prices that CAPs can charge. Incumbent LECs are free to lower their prices as well as to raise them, and there is no reason to believe that competitors will build facilities on the expectation that prices will forever stay at artificially high levels.[26]

III. Allowing Unrestricted Use of EELs Would Further Important Congressional and Commission Goals

As explained above, the Commission's original policy justifications for imposing interim use restrictions on EELs must be re-evaluated in light of the record that now shows that competitive LECs are impaired without access to EELs for a wide range of services. In conducting this re-evaluation, the Commission should also bear in mind that allowing unrestricted use of EELs would advance several important Congressional and Commission goals.

Congress passed the Telecommunications Act to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[27] Allowing the unrestricted use of EELs would represent a significant step toward these goals. Specifically, unrestricted use would: (1) secure lower prices for consumers by driving special access rates to cost; (2) promote competition by sharply reducing the potential for incumbents to engage in price squeezes; and (3) free up scarce resources by eliminating the administrative burdens that the interim rules currently impose on both the Commission and carriers.

Driving Special Access Prices to Cost. As the record demonstrates, it is in the public interest for the Commission to allow competitive carriers to substitute EELs for incumbent LEC special access service. Since EELs are leased to competitors at cost-

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would be eliminated for all BOCs except BellSouth, which would have a multi-line business PICC at that time of approximately $0.20 per line).

[25] *CALLS Order* ¶¶ 30(8), 202 (stating that "$650 million is a reasonable estimate of the amount of universal service support that currently is in our interstate access charge regime"), 203, 268.

[26] *See* WorldCom Reply Comments at 48-49; Kelley Decl. ¶ 18 (attached as Att. B to WorldCom Reply Comments).

[27] Preamble to 1996 Act, Pub.L. 104-104, 110 Stat. 56.

based rates that are in many cases lower than tariffed special access rates, allowing such substitutions would help drive access rates toward economically efficient levels.[28]

A comparison of loop and transport UNE rates with special access yields two conclusions. First, in the aggregate, special access rates are significantly above cost. Second, the differential between special access and UNE rates is not uniform, but is much more pronounced with respect to the mileage component. In particular:

- UNE DS1 loops are priced approximately 18% less than the comparable special access price, and UNE DS3 loops are approximately 28% less than special access;[29]

- UNE DS1 and DS3 transport fixed charges are similar to special access fixed charges;[30] and

- UNE DS1 mileage charges are discounted 89% off special access transport mileage, and UNE DS3 mileage is discounted 60%.[31]

As the above data reveal, the most significant pricing difference between special access and UNEs lies in the mileage component, for which there is little or no competitive alternative, and the least ability for competitive carriers to self-provision.[32]

In contrast, the most competitive portion of any special access service is the entrance facility between an incumbent LEC's serving wire center and a competitive carrier's point of presence ("POP"), as well as low mileage routes in high-density metropolitan areas. Competition in the provision of entrance facilities is evidenced by the incumbent LECs' pricing behavior. Large carriers such as WorldCom typically purchase SONET entrance facilities from the incumbent LECs. These facilities are not available as UNEs, but are offered at a discount, on a voice-grade equivalent basis, to DS3 UNEs that could be substituted for SONET entrance facilities. Moreover, the fact that UNE DS3 transport fixed charges, which are essentially zero mileage DS3s, are virtually identical to the rates for special access entrance facilities confirms that TELRIC-based rates are an appropriate proxy for competitive pricing.[33] Special access rates must therefore approach UNE rates if they are to be economically efficient. Far from approaching such economically efficient levels, however, data provided by the BOCs show that special access prices have in fact increased over the past several years,

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[28] WorldCom has previously explained that DS0 EEL rates require further review to ensure that they are set at TELRIC levels. *See* Scardino Letter.

[29] Hultquist Letter at 7.

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *See Verizon*, 122 S.Ct. at 1668-79.

particularly in areas where BOCs have pricing flexibility.[34] These increased rates have yielded significant jumps in the interstate rate of return for special access: ARMIS data show that the incumbent LECs' rates of return on special access services increased from 9.7% in 1997 to 37.5% in 2001.[35]

The Commission's goal has been and should continue to be to have access services priced at cost-based rates, and as the above discussion makes clear, that goal has not yet been accomplished.[36] Removing the artificial barriers that currently prevent competitive carriers from using EELs for all types of traffic will help the Commission realize its goal.[37]

Eliminating the Potential for a Price Squeeze. Unless competitive carriers are permitted to use EELs for all types of traffic, the BOCs will be able to leverage their control over local transmission facilities to undermine the currently robust competition for long distance services to large enterprise business customers with multiple locations.[38]

A critical development since the Commission issued its *Supplemental Order Clarification* is the extent to which the BOCs have gained authority to provide in-region interLATA long distance service under section 271 of the Act. At the time the Commission adopted the *Supplemental Order Clarification*, only one BOC (Verizon) had received section 271 authority for only one state (New York). The possibility that the BOCs would use the difference between special access rates and the economic cost of providing special access service to execute a "price squeeze," while present, did not have

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[34] *See AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM 10593, Petition for Rulemaking at 3, 11-12 (Oct. 15, 2002) ("AT&T Petition").

[35] *See* <http://gullfoss2.fcc.gov/prod/ccb/armis1/forms/preset/Basic_Financial_Data_Main.cfm>, BOC data (including Verizon-GTE) for 1997 and 2001, row 1920, column (s); AT&T Petition at 8 (showing that three out of the four BOCs are realizing rates of return greater than 46% for special access services); *see also* WorldCom Opposition filed in response to Verizon Petition for Emergency Declaratory and Other Relief, WC Docket No. 02-202, at 2 (Aug. 15, 2002).

[36] *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, ¶ 48 (1997) ("*Access Charge Reform Order*") (stating that FCC anticipated that the pro-competitive regime created by the Act would drive access prices to competitive levels, but that where competition did not emerge, the Commission would "reserve the right to adjust rates in the future to bring them into line with forward-looking costs.").

[37] It is worth noting that, although the BOCs have repeatedly claimed that states are setting UNE-P rates "too low" because they are trying to maintain a margin between UNE-P rates and retail rates, the BOCs have not made an analogous assertion regarding the gap between UNE rates for loops and transport and rates for special access. Thus, arguments that UNE pricing is being driven by retail rates are not present with respect to EELs.

[38] Large enterprise customers seek a single provider that can serve all of their locations (sometimes throughout a region, or even throughout the country), allowing for complete integration of all their telecommunications services.

the immediacy that it has today.[39] The situation has changed dramatically. Verizon, for instance, now has section 271 authority in eleven states covering 87% of its in-region lines, while BellSouth has secured 271 authority in seven states covering 62% of its lines, and has applications covering the remaining 38% currently pending at the Commission.[40]

As the BOCs gain the authority to provide interLATA services nationwide, they will be able to compete for enterprise customers in a way that previously has been foreclosed to them. Although the BOCs may not be able to make substantial inroads into enterprise business services as quickly as they did in residential long-distance service, it is only a matter of time before the BOCs become significant players in this important line of business.[41]

One potential danger is that the BOCs will use their market power over local facilities to execute a price squeeze by continuing to charge competitive carriers special access rates that far exceed the BOCs' economic costs of providing special access.[42] This will create a classic "price squeeze," raising the costs of key inputs (in this case, special access) that competitive carriers need to provide service to customers, while lowering the prices they offer to those same end-user customers. In this case, the competitive carriers will not be able to compete with the incumbent LECs that supply those inputs.[43]

Alternatively, the BOCs may merely match the competitive carriers' price, which reflects the excessive access rates charged by the BOCs. In this case, consumers will not benefit from the lower prices that increased competition would bring, as end-user customers will be forced to overpay for services that rely on incumbent LEC special access as an input.[44]

Eliminating Substantial Administrative Burdens. The record is clear that eliminating the existing use restrictions on EELs would free up scarce resources for both the Commission and carriers. There is substantial record evidence, for instance, that use restrictions are extremely burdensome to administer: they are hard to police; to the extent they can be policed, they require highly intrusive measures; they embroil the Commission

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[39] As explained more fully below, a price squeeze occurs when a BOC uses its control of inputs (*e.g.* loops and/or transport) to raise the price of special access and/or lower the price of BOC services using those inputs.

[40] Legg Mason, *Washington Telecom & Media Insider* at 3 (Nov. 15, 2002).

[41] *See, e.g.*, Verizon News Release, "Verizon Extending Network to Deliver Advanced Services to Large Business, Government Customers" (Nov. 4, 2002), *available at*: <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=77993>.

[42] *See Access Charge Reform Order*, ¶ 277 (discussing how an incumbent LEC could implement a price squeeze once it began offering in-region interexchange toll services); AT&T Petition at 23.

[43] *WorldCom v. FCC*, 2002 U.S. App. LEXIS 22009, *18-*19 (D.C.Cir. Oct. 22, 2002).

[44] *See* AT&T Petition at 3 ("The Bells' special access windfalls already represent at least a *$5 billion* annual direct tax on American businesses and consumers, and the problem is only worsening.") (emphasis in the original); *id.* at 8.

and carriers in controversy and litigation; they dampen innovation; and they waste the scarce resources of the Commission and carriers alike.[45] Thus, the best way to sustain competition for enterprise customers is to require the BOCs to make EELs available on an unrestricted basis.

IV. The BOC Arguments Favoring Restrictions on Loop and Transport Combinations Are Meritless

A. The Incumbents' Predictions Regarding Lost Special Access Revenues Are Exaggerated

The incumbent LECs claim that if the Commission were to permit the unrestricted use of combinations of UNEs in lieu of special access services, incumbents would experience a sudden and deep reduction in their special access revenues.[46] This concern is unfounded.

First, any losses in special access revenues would not be sudden. Even if the current "interim" restrictions on EELs were lifted today, it would likely take a number of years for the change to be fully implemented, since most large special access users have long-term contracts with stiff penalties for early termination, providing a built-in transition period.

Second, if the Commission adopts a more granular analysis for transport (as recommended by WorldCom), it is likely that unbundled transport – and hence EELs – will be unavailable in certain central offices.[47] In all areas served by those central offices, the incumbents will face *no* risk of losing revenues from their special access offerings because of EELs.

Moreover, if, as the BOCs claim, their special access revenues are concentrated in a few central offices where competition is fierce,[48] they should not be concerned about the Commission's eliminating the interim restrictions on EELs in conjunction with undertaking a more granular analysis. If the BOCs are correct about the concentration of their special access revenues, a more granular analysis will result in transport not being unbundled – and EELs not being available – in the very central offices from which the BOCs derive the bulk of their special access revenues. In addition, to the extent that most

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[45] *See generally* WorldCom Comments at 56-57.

[46] *See* Verizon Comments at 139. The Commission expressed similar concerns when it put in place restrictions on the use of EELs as an "interim" solution. *See Supplemental Order* ¶ 3.

[47] WorldCom is asking for unrestricted access to high-capacity EELs only in those geographic areas where unbundled high-capacity loops and transport are available. The considerations with respect to the DS0 EELs necessary for any transition from UNE-P to use of the competitor's own switch may well be different.

[48] *See, e.g.*, Verizon Comments at 137; SBC Comments at 106; Letter from William P. Barr, Verizon, to Chairman Powell, FCC, at 12-13 (Oct. 16, 2002).

of their special access revenue comes from areas that are fiercely competitive, there should be no disparity between the market-based price for special access services in those areas and the TELRIC-based UNE rates for comparable EELs. Indeed, as WorldCom has shown, so-called zero mileage transport service rates are substantially similar to UNE rates. Thus, if the incumbent LECs are correct in claiming that their special access revenues are derived primarily from competitive areas, they have nothing to fear from a rule permitting unrestricted use of EELs.

B. The Fact that Certain Downstream Businesses Are Competitive Is Irrelevant to the Impairment Analysis

The record is clear that the incumbent LECs retain market power over local transmission networks. The BOCs control an overwhelming share of the local transmission facilities,[49] and the high fixed and sunk costs involved in constructing local facilities make it very difficult for competitors to enter by constructing their own local transmission facilities.[50] Thus, all relevant factors support a finding that the BOCs have maintained their dominance over local transmission facilities.[51]

The BOCs have nevertheless argued that several of the downstream businesses that rely on those bottleneck transmission facilities are competitive, and that the Commission ought to engage in a service-by-service analysis and deny access to bottleneck facilities whenever they are used to provide access to services that are otherwise competitive. In particular, the BOCs argue that special access, long distance and wireless services all are competitive.[52] First, as shown repeatedly across a number of proceedings, special access services are not competitive.[53] As WorldCom and others have explained, the Commission's grants of pricing flexibility do not constitute findings that the BOCs are no longer dominant in the provision of special access even in those

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[49] *See* Hultquist Letter at 8 ("[T]he record is absolutely clear that there are no competitive alternatives to BOC last-mile DS1s for nearly 90% of the relevant customer locations in the most competitive areas in the country."); *see also* AT&T Petition at 16 ("[T]here are generally no alternatives to the Bells' last mile transmission facilities, even high-capacity loops and transport facilities.").

[50] *See* WorldCom Reply Comments at 14-18; AT&T Comments at 124, 128; AT&T Reply Comments at 13, 44.

[51] *See, e.g., Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, First Report and Order, 85 F.C.C. 2d 1, 20-21 (1980); *AT&T Reclassification Order*, 11 FCC Rcd 3271, ¶ 26 (1995); *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area,* 12 FCC Rcd 15756, ¶ 93 (1997) ("*LEC Classification Order*").

[52] *See, e.g.,* SBC *ex parte* presentation, "Triennial Review," at 18 (Oct. 23, 2002), attached to Letter from Jay Bennett, SBC, to Marlene H. Dortch, FCC (Oct. 24, 2002).

[53] *See, e.g.,* AT&T Petition at 25-32; WorldCom Reply Comments at 35, n.96; *Performance Measurements and Standards for Interstate Special Access Services,* CC Docket No. 01-321, WorldCom's Comments at 3-4, 9-10, 34, n.87 (Jan. 22, 2002); WorldCom's Reply Comments, CC Docket No. 01-321, at 3-6 (Feb. 12, 2002).

MSAs where they have been granted price cap relief.[54] In fact, the BOCs have maintained or raised their special access rates in areas where they have been granted pricing flexibility.[55]

But the larger point is that whatever competition exists in these downstream businesses exists only because regulators have required the incumbent LECs to provide access to the necessary bottleneck facilities. That being so, it is irrational to rely on that downstream competition as a justification to *deregulate* those same upstream bottleneck facilities. For example, WorldCom's frame relay and ATM networks are dependent on BOC special access for the local transmission used to connect WorldCom facilities to end-user customers. Similarly, long distance services are dependent on all the facilities used for interstate access, including loops and interoffice transport. The relevant inquiry is whether the upstream inputs remain under the monopoly control of the incumbent LECs. The fact that downstream services are competitive because of existing regulation may prove the effectiveness of that regulation. It certainly does not prove that regulation is no longer necessary.

Indeed, the argument that the upstream exchange access business must be competitive because the downstream long distance business is competitive is not only illogical, but is also at odds with prior Commission pronouncements. In the *LEC Classification Order*, for example, the Commission concluded that the BOCs possessed market power in the provision of local exchange and exchange access services in their respective regions, despite the fact that the interLATA services business was competitive.[56] In rejecting BOC attempts to dispute the Commission's assumption that the BOCs had, and would maintain, control of bottleneck access facilities,[57] the Commission noted that the BOCs provide "an overwhelming share" of local exchange and exchange access services.[58] The Commission's decision to classify the BOCs' interLATA affiliates as non-dominant was not based on any finding that the upstream market for exchange access was competitive. Indeed, the FCC explicitly recognized the risk that the BOCs could leverage their power in the upstream local exchange and exchange access businesses to act anticompetitively in the downstream long distance

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[54] *Access Charge Reform,* Fifth Report and Order, 14 FCC Rcd 14221, ¶¶ 90, 151 (1999); WorldCom Reply Comments at 131; Hultquist Letter at 5-6; AT&T Petition at 11.

[55] *See* n.34 *supra.*

[56] *Compare, e.g., LEC Classification Order* at ¶ 86 (recognizing that "markets for long distance services are substantially competitive in most areas") *with id.* at ¶ 100 (concluding that the BOCs "currently possess market power in the provision of local exchange and exchange access services in their respective regions."); *see also Non-Accounting Safeguards Order*, 11 FCC Rcd 21905, ¶ 6 (1996) (stating that the non-accounting safeguards are intended "to protect competition in [competitive] markets from the BOCs' ability to use their existing market power in local exchange services to obtain an anticompetitive advantage in those new markets the BOCs seek to enter.").

[57] *LEC Classification Order* at ¶ 99.

[58] *Id.* ¶ 100.

business.[59] Ultimately, however, the Commission concluded that the best way to combat this problem was not by classifying the BOCs' interLATA affiliates as dominant, but by relying on other regulatory safeguards.[60]

In sum, the incumbent LECs' claim that access facilities must be competitive because the long distance business is competitive is nonsense. In fact, adopting and applying the standard proposed by the incumbent LECs would surely lead to the end of competition in downstream businesses; the long distance business will not remain competitive after BOC entry into interLATA services unless the BOCs are constrained from using their power in the provision of upstream exchange and exchange access to act anticompetitively in the provision of downstream interexchange services.

In addition, the BOCs' attempts to restrict the use of UNEs for long distance services are at odds with another set of Commission precedents. The Commission consistently has held, since the *Local Competition Order*, that competitive carriers purchasing UNEs may use those network elements to provide access services as well as local and long distance services.[61] The Commission therefore should reject the BOCs' arguments as inconsistent with both sound economics and the Commission's previous decisions.

V. The Commission Should Eliminate the Restriction on Commingling

A. Eliminating the Prohibition on Commingling Would Enhance the Efficiency of Network Deployment

Even if the Commission decides to retain some kind of use restriction on EELs, it should at the very least abandon its indefensible ban on "commingling." The current prohibition against commingling prevents competitive carriers from using facilities as efficiently as the incumbent LECs. While the incumbent LECs are free to carry local and long distance (access) services over the same loop and transport facilities, competitors are barred from realizing these same efficiencies. Instead, competitive carriers are forced to operate two sets of facilities – one for local services and another for long distance

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[59] *See, e.g., id.* ¶ 91 (acknowledging the BOCs' ability to engage in a price squeeze by raising its prices for access services).

[60] *Id.* ¶¶ 6, 91, 106.

[61] *Local Competition Order* at ¶ 264; *accord, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶ 484 (1999) ("*UNE Remand Order*"). The ruling from the *Local Competition Order* was codified in 47 C.F.R. § 51.307(c) (requiring incumbent LECs to provide access to UNEs "in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element"); and 47 C.F.R. § 51.309(a) (prohibiting incumbent LECs from imposing restrictions on requesting carriers' use of UNEs).

services. This unnecessary duplication is highly inefficient[62] and results in higher costs for consumers.

Moreover, as WorldCom explained in its reply comments, the ability to "commingle" UNEs and access services is critical to competitive carriers obtaining the scale advantages enjoyed by the incumbent LECs.[63] Commingling will grow even more essential if the Commission conducts a geographically granular impairment analysis of interoffice transport. If the Commission decides that competitors are no longer impaired without access to unbundled transport out of a particular central office, then carriers will no longer be able to obtain UNE transport in that area. In that case, competitive carriers will need to be able to "commingle" UNE loops with incumbent LEC special access facilities in order to serve customers in that area at competitive rates. Without this option, competitors would in effect be barred from ever realizing the same efficiencies as the incumbent with respect to all traffic routed through those central offices.

B. The Commission Has the Legal Authority to Lift the Temporary Ban on Commingling

The FCC clearly has the legal authority to require the BOCs to permit commingling pursuant to both section 251(c)(3) and section 201 of the Act. This authority is unaffected by the *CompTel* decision, which neither addresses the merits of the current ban on commingling nor limits the Commission's authority to permit commingling.

Section 251(c)(3). Section 251(c)(3) obligates incumbent LECs "to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis *at any technically feasible point* on rates, terms, and conditions that are just, reasonable and nondiscriminatory."[64] The Commission has previously recognized that the Act does not contemplate exceptions to this requirement.[65]

As WorldCom has previously explained, commingling is a technically feasible way for incumbents to provide access to UNEs such as those that comprise EELs.[66] For

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[62] *See Verizon*, 122 S.Ct. at 1672 (noting that FCC's requirement that competitors "construct unnecessarily duplicative facilities" results in a "misallocat[ion of] societal resources.") (quoting *Local Competition Order* ¶ 378).

[63] *See* WorldCom Reply Comments at 32-34.

[64] 47 U.S.C. § 251(c)(3) (emphasis added); *see also* 47 C.F.R. § 51.321(a).

[65] As the Commission has explained, "[t]he language of section 251(c)(3) is cast exclusively in terms of obligations imposed on incumbent LECs, and it does not discuss, reference, or suggest a limitation or requirement in connection with the right of new entrants to obtain access to unbundled elements." *Local Competition Order*, ¶ 328; *see also Application of BellSouth Corporation for Provision of In-Region, InterLATA Services in Louisiana*, 13 FCC Rcd 20599, ¶ 168 (1998) (collocation not exclusive means of access to UNEs); 47 C.F.R. § 51.321(b)(1).

[66] *See* WorldCom Reply Comments at 33-34.

instance, there is no technical reason that a DS1 loop cannot be connected to a 3:1 multiplexer at an incumbent LEC's serving wire center and multiplexed onto a DS3 circuit purchased out of the incumbent's interstate special access tariff.[67] Under the Commission's rules: "[a] previously successful method of obtaining interconnection or access to unbundled elements at a particular premises or point on any incumbent LEC's network is substantial evidence that such method is technically feasible in the case of substantially similar network premises or points."[68] Today, incumbent LECs successfully commingle UNEs with access services when a competitor's collocation arrangement is interposed between the UNE and the access service.[69] There is no practical difference between commingling UNEs with special access with or without a collocation arrangement. In either case, the incumbent LEC is responsible for the individual DS1 loops and the DS-3 transport facility.

Section 201(b). Section 201(b) requires that "[a]ll charges, practices, classifications, and regulations for and in connection with ... communication service[s] shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."[70] This section confers a broad mandate on the Commission to protect against a carrier's unjust or unreasonable practices, especially where such practices constrain competition and diminish consumer rights.[71] As explained above, the sole purpose of a commingling prohibition can only be to raise rivals' costs by requiring competitors to duplicate facilities wastefully. Such a prohibition thus constitutes an unjust and unreasonable practice under section 201(b).

Accordingly, the Commission should exercise its authority under the Act and require incumbent LECs to permit requesting carriers to commingle UNEs and special access facilities.

C. Qwest's Recent Claims Regarding Commingling Are Inaccurate and Misleading

In a recent *ex parte*, Qwest argues that the current commingling prohibition does not impede competitive LECs from configuring their networks efficiently. According to Qwest, "where the loop interconnects to the collocation cage which houses a multiplexer, the CLEC can combine all facilities on the interoffice network through the purchase of special access" and "can also groom interexchange traffic off an existing facility and then

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[67] *See id.* at 33.

[68] 47 C.F.R. § 51.321(c).

[69] *See* WorldCom Reply Comments at 33-34.

[70] 47 U.S.C. § 201(b).

[71] *See, e.g., Radiofone, Inc. v. Bellsouth Mobility, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 6088, ¶ 33 (1999) (acknowledging "the broad 'public interest' and 'just and reasonable' standards set forth in Sections 201(b)"); *Computer II Order*, 77 F.C.C.2d 384, ¶ 142 (1980) ("broad consumer rights under Section 201(b)" and "corresponding carrier responsibilities" have fostered consumer choice and "opened up various segments of the equipment market to new entrants").

convert that facility to an EEL."[72] This claim is inaccurate in at least two ways. First, a collocation cage almost never houses a multiplexer. WorldCom, for instance, almost always purchases multiplexing equipment from the incumbent LEC because doing so saves valuable space in the collocation cage, and allows WorldCom to replace 28 DS1 cable connections with a single DS3 connection, thereby reducing the need for technicians to deal with the problems arising from a large number of cross connects. Second, if WorldCom, with the help of the incumbent LEC, were to groom interexchange traffic off the existing incumbent LEC-provided multiplexer and onto a new one, WorldCom would have to pay for two multiplexers (one for the local traffic and one for the interexchange traffic) instead of one, and both would have substantial unused capacity. As explained above, it is highly inefficient and anticompetitive to force competitors to operate two networks (or portions thereof) when the incumbent LEC is free to operate a single efficient network.[73]

In the same *ex parte*, Qwest also argues that the "current use restrictions do NOT inhibit CLEC business" because "Qwest has adopted audit guidelines for EELs to make it 'easy to do business.'"[74] Qwest's claim misses the point. As long as the commingling prohibition remains in place, competitive carriers will be severely restricted in their ability to convert special access circuits to EELs. Competitive carriers thus are not able to take advantage of Qwest's audit guidelines. No matter how "easy" Qwest's audit guidelines are to use, they are useless to competitive carriers until the commingling prohibition is lifted.

VI. Conclusion

For all of the reasons stated above, the Commission should eliminate the interim restrictions placed on EELs in its *Supplemental Order* and *Supplemental Order Clarification*.

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[72] Qwest *ex parte* presentation, "Local Transport Discussion," at 3 (Oct. 24, 2002), attached to Letter from Cronan O'Connell, Qwest, to Marlene H. Dortch, FCC (Oct. 28, 2002) ("Qwest Local Transport Discussion").

[73] *See* discussion at section V.A., *supra* at 13-14.

[74] Qwest Local Transport Discussion at 4 (citing Qwest April 2000 ex parte and Qwest's SGAT section 9.23.3.7.2).